Supreme Court, U.S.
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IN THE

United States Supreme Court

DONALD HECHT, by his Co-Guardian,
DONALD HECHT, SS#: 054-60-6120 DI,

Petitioner,

against

JO ANNE B. BARNHART, Commissioner
of the Social Security Administration,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Second Circuit err by not applying the holding in *Christensen v. Harris County*, 529 U.S. 576 (2000), whereby the Judiciary is to defer to a promulgated regulation and not defer to an agency internal memo, in a case in which the SSA Commissioner did not apply to the *Hecht* facts, her own income regulation, 20 C.F.R. § 416.1130(b), that is applied by the SSA Commissioner in the Seventh Circuit States?

Because the SSA Commissioner is not acquiescing to the Seventh Circuit unappealed *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982), decision which applied the SSA Commissioner's income regulation, 20 C.F.R. § 416.1130(b), have SSA Commissioner Barnhart and Attorney General Ashcroft breached the "take Care" clause of Article II, Section 3 of the Constitution, by continuing to implement a SSA nonacquiescence policy, based on the Immigration and Naturalization Service *United States v. Mendoza*, 464 U.S. 154 (1984), decision?

PARTIES TO THE PROCEEDING

Petitioner Daniel Hecht is a severely disabled 28 year old who cannot walk, talk, or perform any activities of daily living. He is represented in the action by his Guardian-father Donald Hecht, Esq.

The respondent is the Social Security Administration Commissioner who rendered the decision after the petitioner had exhausted his administrative remedies.

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OPINIONS BELOW

On August 26, 2002, Judge Arthur Spatt of the Eastern District of New York rendered a Memorandum and Order that affirmed the Social Security Administration (SSA) Commissioner's decision to reduce the monthly SSI benefits by one third because the Guardian-Trustee of a Court Ordered Supplemental Needs Trust, who was also the parent-landlord, paid the rent of Daniel Hecht. Judge Spatt rejected all of the plaintiff's arguments and did not apply the SSI regulatory standard, 20 C.F.R. 416.1130(b), to the *Hecht* facts.

Rather than apply a regulatory standard, Judge Spatt deferred to SSA Commissioner's application of SSA Program Operations Manual Systems standard, POMS SI 01120.200(E)(1). The plaintiff appealed that decision making the argument that Judge Spatt erred by not applying the SSI income regulation, 20 C.F.R. § 416.1130(b).

On June 27, 2003, the Second Circuit Court of Appeals issued a Summary Order and affirmed Judge Spatt's decision. As to the *Christensen* administrative law holding, the Second held that:

> Hecht is correct that such policy statements are not entitled to the same *Chevron* deference as implementing regulations. *See Christensen v. Harris County*, 529 U.S. 576. 587-88 (2000) (discussing *Chevron U.S.A.,Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984)). Nevertheless, policy statements are "entitled to respect" to the extent that they have the "power to persuade." *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also McMenemy v. City of*

Rochester, 241 F.3d 279, 284 (2d Cir. 2001) (upholding statutory interpretation in agency manual that was consistent with language and purpose of the law, noting that "even when deference is not required, an agency has a "body of experience and informed judgment to which courts and litigants may properly resort for guidance" (quoting *Skidmore*, 323 U.S. at 140)). The distinction POMS SI 01120.200 draws between trust principal and disbursements is persuasive both because consistent with the treatment of in-kind income in 20 C.F.R. § 416.1103 (g) as well as with New York State trust law. *See* N.Y. Est. Powers & Trusts Law § 7-1.12 (b)(3) (McKinney 2002) ("actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any (government benefits) program"). *Id.* slip opinion, p. 5.

The Court is advised that the petition for a Second Circuit rehearing is pending.

STATEMENT OF JURISDICTION

Jurisdiction is invoked under 28 U.S.C. § 1254(1). Petitioner seeks a review of the Second Circuit Court of Appeals *Hecht v. Barnhart* Summary Order because the Second Circuit did not apply this Court's *Christensen v. Harris County*, 529 U.S.576 (2000), administrative law holding, and because there is a conflict between the Second Circuit *Hecht* Summary Order and the Seventh Circuit *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982), decision applying the SSA Commissioner's income regulation, 20 C.F.R. § 416.1130(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article II, Section 3 of the Constitution:

> . . . . . he shall take Care that the Laws be faithfully executed . . .

2. The SSI statutory income standard 42 U.S.C § 1382a(a)(2)(A):

> (2) unearned income means all other income, including,
>
> A) support and maintenance furnished in cash or kind;

STATEMENT OF THE CASE

In 1972 President Nixon, created a new federal welfare program, Supplemental Security Income (SSI), Title XVI of the Social Security Act. On January 1, 1974, the enabling SSI statute replaced the State administered Federal categorical AABD (aid to the aged, blind and disabled) programs. 42 U.S.C. § 1381 *et seq.*

On December 14, 1974, Daniel Hecht was born. At the age of three months, Daniel suffered a severe reaction to a pertussis inoculation and became permanently disabled such that he cannot walk, talk, or perform any activities of daily living.

On May 2, 1988, plaintiff settled the action *Hecht v. Heitler, Haber, et al.* Index No. 3313/84 (Nassau Co. Sup. Ct.), for approximately $ 500,000 and an annuity paying $ 1000 per month for David's life. On November 9, 1992,

Donald S. Hecht and Laura Hecht were appointed the Co-Conservators of Daniel Hecht, their son.

On August 11, 1993, President Clinton signed into law OBRA 1993 which established the statutory right of a disabled person to establish a Trust in order that the disabled person would not lose the right to receive government entitlements on the condition that upon death, the resources remaining in the Trust would be subject to a Medicaid lien. 42 U.S.C. § 1396d(4)(A). In 1994, New York State enacted compliance legislation and denominated these Trusts as Supplemental Needs Trusts (SNT). *See* E.P.T.L. 7-1.12.

On December 19, 1995, the plaintiff's parents, petitioned the Nassau Supreme Court to covert the Conservatorship to a Guardianship and transfer the assets of the plaintiff into an SNT. On March 26, 1996, State Court Justice Rossetti signed the Order and Judgment appointing the Co-Guardians and ordered that the resources be transferred into the proposed SNT.

The Order included payment by the Trustee from the SNT of $ 2000 month caretaking stipend for the Co-Guardian-mother Laura Hecht and $ 750 for room and board. The Order contained an explicit income standard that the Trustee was to apply the legal standard as applied in the Second Circuit's *Ruppert* decision. "The Trustee will provide income in-kind from the Trust pursuant to its specific distribution provisions in order to provide for the special needs of the beneficiary by furnishing those items of need not provided by government entitlements consistent with the definition of income as intended by the Congress and decided in *Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989).

On May 14, 1998, the defendant granted the June 14, 1996 *Hecht* application for Supplemental Security of Income (SSI) benefits. However, the defendant reduced the plaintiff's monthly SSI payment amount because of the alleged receipt of in-kind income:

> *The food, clothing, or shelter he got from someone.* We value the food, clothing or shelter at $ 176.66 for June 1996 through December 1996, $ 181.33 for January 1997 through December 1997 and $ 184.66 for January 1998 through May, 1998. Emphasis Added.

On September 15, 1999, ALJ Emanuel Poverstein reversed the initial decision and explicitly made a finding of fact that all disbursements were authorized by the Court and did *not* constitute in kind support and maintenance:

> 4. *As disbursements from the trust are directed and authorized by an appropriate court in accordance with the terms of the trust*, the disbursements do *not* constitute in kind support and maintenance and therefore cannot be deemed income of the claimant. Emphasis Added.

On October 7, 1999, Regional Commissioner Disman requested that the SSA Deputy Director of Office of Appellate Operations reopen the decision based on the application of POMS SI 01120.200E.1.b:

> A review of the file indicates that the claimant has an excluded "supplemental needs trust that pays $ 750.00 of his mortgage, rent, heating fuel, water, gas, property taxes, electricity, garbage removal and

> sewer bills." *Because this was used toward his shelter costs, the maximum amount of in-kind support and maintenance was charged.*
>
> *There is nothing in the Regulations that would allow for the exclusion of this type of income. However, POMS SI 01120.200E.1.b. states* "Food, clothing or shelter received as a result of disbursements from the trust by the trustee to a third party are income in the form of in-kind support and maintenance and are valued under the presumed maximum value (PMV) rule. Emphasis Added.

On May 12, 2000, Administrative Appeals Judge (AAJ) Peter N. Dowd affirmed the decision of SSA Regional Disman that ALJ Poverstein had applied an incorrect legal standard and reversed ALJ Poverstein's September 15, 1999 decision. AAJ Dowd discussed the SSI income regulation, 20 C.F.R. 416.1130, but did not apply the Seventh Circuit "Jackson" regulation, 20 C.F.R. 416.1130(b).

> Because the principal of a supplemental needs trust is not charged as a resource to the beneficiary of the trust, the distributions from the trust paid to a provider of support and maintenance *result in in-kind income to the beneficiary of the trust (20 CFR 416.1130), rather than cash income. In-kind income is valued under the "presumed value rule" (20 CFR 416.1140); i.e.*, the value of the support is presumed to be one-third of the Federal benefit rate plus $ 20, unless there is a showing that actual value is less. Emphasis added.

Pursuant to 42 U.S.C. § 405(g), the petitioner filed a complaint to appeal this decision. The plaintiff alleged that the SSA commissioner was implementing a nonacquiescence policy by not applying the "Jackson" regulatory standard, 20 C.F.R. § 416.1130(b), to the *Hecht* facts because the plaintiff's rent of $ 750 per month was more than one third of his SSI income payment.

REASONS FOR GRANTING THE WRIT

Petitioner Daniel Hecht respectfully requests that this Honorable Court issue a Writ of Certiorari and review the Second Circuit Court of Appeals *Hecht* Summary Order which held that the Social Security Administration correctly reduced Daniel's monthly Supplemental Security Income (SSI) benefits because his rent of $ 750 per month was paid by the Trustee of his Supplemental Needs Trust, notwithstanding an SSA income regulation, 20 C.F.R. 416.1130(b), which if applied would *not* have counted the private rent subsidy as countable income to reduce the monthly SSI payment amount.

The Second Circuit's decision to apply the POMS, its internal memo standard, rather than the SSI income regulatory standard, is not consistent with this Court's *Christensen v. Harris County*, 529 U.S. 576 (2000), administrative law holding. In *Christensen*, this Court eliminated any ambiguity in the application of the *Chevron* Doctrine as to the Judiciary's deference to letter-opinions of Executive Branch counsel as applied in a Fair Labor Standards Act of 1938 (FSLA) case:

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after,

> for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters-like interpretations contained in policy statements, *agency manuals*, and enforcement guidelines, *all of which lack the force of law*—do not warrant *Chevron*-style deference. *Id.* at 1662. Emphasis added.

In *Hecht*, the SSA Commissioner's POMS SI 01120.200(E)(1), was an interpretation of the SSI income regulation, 20 C.F.R. 416.1130(b). By applying the POMS standard to the *Hecht* facts, rather than the underlying income regulation, the Court jumped to a "power to persuade" analysis, rather than first applying the income regulation, 20 C.F.R. 416.1130(b), to the facts.

If the petition was granted, then this Court would first decide whether the *Christensen* administrative law holding applies to the Social Security Administration with its complicated and elaborate POMS. *See* SSA.gov. The Court would then have an opportunity to clarify the sequence of applying the *Christensen* holding as to whether the reviewing court is to first apply the promulgated regulation upon which the POMS is based, and only apply the POMS "power to persuade" standard if there is ambiguity in the promulgated regulation.

This case also raises the lurking issue of the SSA Commissioner's implementation of an SSA nonacquiescence policy whereby the SSA Commissioner's counsel decide which circuit court decisions are "incorrectly" decided, should *not* be appealed, and should *not* be applied in any other Circuit. In *Hecht*, the SSA Commissioner did not apply the unappealed Seventh Circuit *Jackson v.*

Schweiker, 683 F. 2d 1076 (7th Cir. 1982), decision which interpreted the application of the SSI income regulation, 20 C.F.R. 416.1130(b).

If the *Hecht* petition was granted, then this Court could revisit *United States v. Mendosa*, 464 U.S. 154 (1984), which affirmed the right of the Immigration and Naturalization Service to make nonacquiescence litigation decisions. This is a timely issue because SSA Commissioner Barnhart is presently confronted with an equal protection conundrum as she constructs the Notices that will cure the due process violations in the unappealed nationwide class decision, *Ford v. Shalala*, 87 F. Supp 2d 163 (E.D.N.Y. 1999). Petitioner Hecht is one of the *Ford* class members who resides in the Second Circuit in which the Seventh Circuit *Jackson* holding and the resulting "Jackson" income regulation, 20 C.F.R. 416.1130(b), has not been applied to the *Hecht* facts.

In summary, the Court should grant the petition in order to have an opportunity to review the SSA Commissioner's decision not to apply the *Christensen* holding administrative law holding when rendering an SSA adjudication. The petition should also be granted in order that the Court can decide whether this Court's 1984 *Mendosa* decision should apply to the SSA now that the SSA Commissioner has duty to cite to duly promulgated regulations in Notices to be sent to the nationwide *Ford* class members, one of whom is petitioner *Hecht*.

POINT I

THE COURT BELOW ERRED BECAUSE IT DID NOT CORRECTLY APPLY THE CHEVRON DOCTRINE, AS INTERPRETED BY THIS COURT IN *CHRISTENSEN*, BECAUSE THE COURT DEFERRED TO THE SSA AGENCY MANUAL AND NOT TO THE SSA COMMISSIONER'S INCOME REGULATION.

The petitioner argues that the Second Circuit erred when rendering the summary order to affirm Judge Spatt's decision affirming the SSA Commissioner's decision. The petitioner argues that the Second Circuit should have applied this Court's May 1, 2000 *Christensen* holding to the facts because the Second Circuit deferred to the SSA Commissioner's POMS, the agency manual standard,, as to the standard to apply, rather than apply the SSA Commissioner's promulgated income regulation, 20 C.F.R. § 416.1130(b).

A. The *Christensen* standard

In *Christensen*, this Court eliminated any ambiguity as to the application of the *Chevron* Doctrine and judicial deference to an agency memo when there is a duly promulgated regulation to apply. Justice Thomas rejected the Department of Labor's and Solicitor General Waxman's "letter-opinion" argument in *Christensen*:

> Seeking to overcome the regulation's obvious meaning, the United States asserts that the agency's opinion letter interpreting the regulation should be given deference under our decision in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L.Ed. 2d 79 (1997). In *Auer*, we held that an agency's interpretation of its

> own regulation is entitled to deference. *Id.* at 461, 117 S. Ct. 905. *See also Bowles v. Seminole Rock & Sand Co.*, 3235 U.S. 410, 65 S. Ct. 1215, 89 L.Ed. 1700 (1945). But *Auer* deference is warranted only when the language of the regulation is ambiguous.—it is plainly permissive. *To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.* Because the regulation is not ambiguous on the issue of the compelled compensatory time, *Auer* deference is unwarranted. *Id.* at 1612. Emphasis added.

The petitioner argues that the SSA Commissioner's regulation is not ambiguous as to meaning, but only as to its limitation to the Seventh Circuit States. That limitation issue is not a *Christensen* issue, but a *Mendosa* issue of the SSA Commissioner implementing a *Jackson* nonacquiescence policy notwithstanding the July 25, 1985 that the nonacquiescence policy had ended on June 3, 1985. See POINT II.

The Second Circuit in *Ruppert* had reconciled its holding with *Jackson* by citing to Solicitor General Lee's October, 1983 *Glasgold-Rothman-Guigno* Brief:

> Appellants point out that the Solicitor General's brief successfully opposing the grant of certiorari in *Rothman* said, irrespective of the positions taken by the Secretary before this court and the *Jackson* court at various stages in each case:
>
> Petitioners rely heavily on *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982), which they claim conflicts

with the decision below and several other court of appeals decisions. However, no such conflict exists.

In *Jackson*, the class representative had her benefits terminated by application of the presumed maximum value regulation when it was determined that she received a rental subsidy from her sister although she nonetheless was paying 77% of her income for rent. The court of appeals expressly "accept[ed] the general validity of the regulation as applied in many situations" (*id.* at 1079 n. 2), but held that, on the particular facts of *Jackson*, it was inappropriate to include the rental subsidy as countable income because "where a very large percentage of income *** is committed to shelter costs before termination of SSI, it flies in the face of reality to conclude that 'unearned income' in the form of subsidized shelter *** is actually available to the recipient." *Id.* at 1085 (emphasis in original). The court of appeals below correctly stated that the rule announced in Jackson was inapplicable here and instead relied on the decisions in other circuits upholding the regulations. . . . Indeed, the *Jackson* court itself recognized the limited nature of its holding, and it explicitly stated that its decision did not conflict with the court of appeals decisions upholding ***1180** the regulations, at 6-7, *Guigno v. Heckler*, 464 U.S. 984, 104 S.Ct. 428, 78 L.Ed.2d 362 (1983) (denial of certiorari in *Rothman*) (emphasis added).

However, notwithstanding its unappealed *Ruppert* decision, the Second Circuit did not apply the "Jackson" regulation. Rather, the Second Circuit applied the POMS standard that interpreted the income regulation as applied

to a payment of rent by the Trustee of a State Court ordered Supplemental Needs Trust.

B. The SSA Commissioner's "Jackson" regulation

The *Jackson* regulation, 20 C.F.R. § 416.1130(b), does *not* make the Trust fund v. non-Trust fund source of payment distinction as made in *Hecht*. The history of the *Jackson* regulation reveals the importance of compliance with the APA in order for the public to be advised of the standards applied in a national program which Congress intended would have uniform standards equally applied in all 50 States.

On January 6, 1984, sixteen years prior to the *Christensen* decision, Chief Judge Sharpe in *Jackson v. Heckler*, 581 F. Supp. 871 (N.D. Ind. 1984), ordered Secretary Heckler to promulgate an SSI in-kind income regulation in order to comply with the Seventh Circuit's unappealed 1982 *Jackson* remand order:

> As an initial matter, the court will consider the parties' dispute over *whether the Secretary must amend the relevant regulation or simply modify internal operation procedures and manuals.* The plaintiff argues that the relief mandated by the court of appeals will be effectively implemented only if SSI claimants and *their representatives or advocates have access to the modifications throughout the regulations found in the Federal Register and the Code of Federal Regulations.* Otherwise, persons using the normal research tools will find nothing but the regulation which found inadequate by the court of appeals and will have no indication that it has been modified. While instructions and guidelines in

> internal operating manual and policy statements may be effective means of informing social security administration personnel it is not an effective means of informing claimants and their representatives. *There is simply no basis for assuming internal operational manual are generally available. Furthermore, the Secretary has not advanced any compelling reason why the regulation should not be amended.* Therefore, this court will require an amendment to the challenged regulation. Emphasis Added.

On October 10, 1985, Judge Sharpe issued a *Jackson* order requiring publication of the amendment to the SSI in-kind income regulation to comply with the Seventh Circuit's order in *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982). On March 27, 1986, based on the *unappealed Jackson v. Schweiker* Seventh Circuit decision, Secretary Bowen certified a proposed amendment to the SSI regulation, 20 C.F.R. § 416.1130. However, without explanation, Secretary Bowen limited the regulation's application to only SSI recipients who resided in the Seventh Circuit States of Indiana, Illinois, and Wisconsin. *See* 51 FR 13487 (April 21, 1986).

C. The July 25, 1985 sworn Congressional testimony that the HHS nonacquiescence policy was to have ended on June 3, 1985

On July 25, 1985, an Oversight Hearing before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary: *Judicial Review of Agency Action: HHS Policy of Nonacquiescence*, was held to consider legislation to end HHS Sec-

retary Heckler's nonacquiescence policy. However, Members of Congress were advised in sworn Congressional testimony that no legislation was needed because HHS and SSA had voluntarily ended their nonacquiescence policy as of June 3, 1985.

Acting SSA Commissioner Martha McSteen explained to Members of Congress the new post-June 3, 1985 "acquiescence" policy, at Tr. 7:

> Mr. Chairman, I know the questions have been raised about this new policy, but I believe we have done our best to reconcile *the need for national uniformity and efficiency* with the wide variety of interpretations of the law by circuit courts.

and at Tr. 19:

> *We will obey the court directives.* We want to follow the congressional mandate. We are very concerned about the individual beneficiaries, and fourth, *we must ensure that we have a uniform method of operating and apply those standards uniformly.* So we debated the issue of how to implement our policy *with great care* and with consideration as to how that should take place and where it should take place. Emphasis added.

On July 25, 1985, Deputy Assistant Attorney General (DAAG) Carolyn Kuhl testified and explained the new policy, at Tr. 10:

> Under its *new policy*, the Social Security Administration acknowledges that, to some extent at least, nationwide uniformity is no longer possible. The Secretary of Health and Human Services *will follow cir-*

> *cuit precedent in making final benefit determinations, except in those few cases presenting an issue which HHS, in consultation with the Solicitor General, determines should be relitigated in order to urge reconsideration of a rule of law in a circuit or to seek potential Supreme Court review*. Thus, as it applies to the courts, this policy means that we will follow circuit precedent when the Department of Justice enters the proceedings—that is in the district court- except where the Justice Department and HHS agree that the issue should be litigated further. . . . Emphasis added.

After the House Judiciary Subcommittee hearing, Members requested that the Commissioner provide a list of then pending "non-acquiescence" cases. SSA Chief Counsel Gonya provided the list of nonacquiescence cases and that list did *not* include *Jackson*. *See* July 25, 1985 House Record, at p. 31-33.

If the sworn July 25, 1985 Congressional testimony was accurate sworn Congressional testimony, then the nonacquiescence policy was to have ended on June 3, 1985. If the *Hecht* petition was granted, then this Court could consider whether the Second Circuit erred when it deferred to SSA Commissioner Barnhart's implementation of the *Jackson* nonacquiescence policy given the sworn July 25, 1985 Congressional testimony of Acting SSA Commissioner Mc Steen and then-DAAG Carolyn Kuhl.

D. The unheeded *Beckless* and *Ragsdale* admonitions

SSA Commissioner Barnhart's continued implementation of his *Jackson* nonacquiescence policy has been criticized by the Courts within the Seventh Circuit and in

non-Seventh Circuit States. If the petition is granted, then Solicitor General Olson can explain to this Court why the *Jackson* regulation was limited to the Seventh Circuit States given the July 25, 1986 sworn Congressional testimony that the nonacquiescence policy had ended on June 3, 1985 and that *Jackson* was not a nonacquiescence case.

On December 3, 1985, Judge Bua in the unappealed *Beckless I v. Heckler*, 622 F. Supp. 715 (D.C. Ill. 1985), certified an Illinois class of SSI recipients and applied, the *Jackson* to Illinois SSI recipients:

> However, it is not clear from the *Jackson* decision whether the Secretary is refusing completely to comply with the Seventh Circuit's decision. The Secretary has not issued a policy of non-acquiescence as was done in *Lopez*, and *without further evidence, it is unclear whether the Secretary has failed to perform her duties as a public official. Id.* at 719. Emphasis Added.

In the unappealed *Beckless II v. Chater*, 909 F.Supp. 575 (N.D.Ill. 1995), Judge Bucklo explained how the SSA Commissioner's interpretation of *Jackson* had eviscerated the Seventh Circuit holding:

> The defendant *essentially argues that the "Exception" applicable to the Seventh Circuit should be read out of section 416.1130(b)*. Opposition def. br. 10. By its words, the exception does not confine a business arrangement to payment of full rent charged by a landlord. *Rather, a business arrangement exists "when the amount of monthly rent required to be paid equals or exceeds the presumed maximum value. . . ." Id.* at n. 4, p. 580. Emphasis Added.

In the unappealed *Ragsdale v. Apfel*, 999 F. Supp. 814 (E. D. Vir. 1998), Judge Payne echoed Judge Bua's 1985 admonishment of Secretary Heckler in *Beckless I* and Judge Bucklo's 1995 admonishment of Secretary Shalala in *Beckless II*, and admonished SSA Commissioner Apfel for *not* to applying the *Jackson* standard to Virginia SSI recipients:

> This litigation need never have occurred. And, that it did, *reflects poorly on the Agency which elected not to seek review of the decisions issued by the Second or Seventh Circuits* and then put the Ragsdales to the needless task of establishing the obvious: that the decisions of the Second and Seventh Circuit were correct. Citizens residing in the Fourth Circuit should not be required needlessly to incur costs and fees in order to achieve the rights already enjoyed by those individuals residing in the Second and Seventh Circuit. It may be that the Agency's conduct is not sanctionable *in this case, but it must be hoped that the Agency will not, in the future, pursue the course which it has followed here. Id.* at 824. Emphasis Added.

Neither Judge Spatt nor the Second Circuit addressed the issue of the SSA Commissioner not heeding the *Beckless II* and *Ragsdale* admonitions. Rather, both Courts deferred to the decisions of the Social Security Commissioner and her Executive Branch counsel to ignore the holdings of these unappealed district court decisions.

E. The *Ford* nationwide class Notice conundrum

The SSA Commissioner's decision not to heed the admonitions of the *Beckless II* and *Ragsdale* Courts will now affect the SSA Commissioner's ability to comply

with Judge Sifton's *Ford* nationwide class due process decision. The SSA Commissioner is now in the process of constructing "Ford" Notices that will cure the due process violation caused by the termination and reduction Notices not containing citations to the applicable regulations. The SSA Commissioner must now decide whether to include a citation to the "Jackson" income regulation in the *Ford* Notices sent to SSI recipients who are receiving private rent subsidies in the 47 States that are not within the Seventh Circuit.

On September 29, 1999, in *Ford v. Apfel* Judge Sifton addressed the issue of the SSI Notices that did not explain the standards that were applied by SSA Commissioner Apfel in denying benefits. Citing *Gray Panthers v. Schweiker*, 652 F. 2d 146, 168-169 (D.C.Cir. 1980), Judge Sifton highlighted the Kafkaesque situation of nationwide class of SSI recipients for whom the standards used to compute benefits are not explained to the SSI applicants and recipients:

> Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—*and resembles more a scene from Kafka than a constitutional process*. Without notice of the specific reasons . . . . a claimant is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument—at the risk of missing the critical one altogether. *Ford*, p. 181. Emphasis Added.

In *Hecht*, the SSI Notices did not cite to the applicable regulations. Indeed, the Notices did not even cite to the POMS that was relied upon in reducing the monthly benefits.

In summary, if SSA Commissioner Apfel acquiesces to *Christensen* and acknowledges that the Judiciary is to defer to duly promulgated regulation, but not defer to the agency manual interpretations, then the "Jackson" regulation should be cited in the "Ford Notices and applied equally in all 50 States. In rendering its decision, the Second Circuit did not apply the "Jackson" regulation to the *Hecht* facts, but rather, relied upon an agency manual which interprets the SSA Commissioner's promulgated regulation.

POINT II

BECAUSE SSA COMMISSIONER BARNHART AND ATTORNEY GENERAL ASHCROFT ARE IMPLEMENTING A *JACKSON* NONACQUIESCENCE POLICY, THE SSA COMMISSIONER AND THE ATTORNEY GENERAL HAVE BREACHED THEIR ARTICLE II SECTION 3 DUTY TO "TAKE CARE THE LAWS BE FAITHFULLY EXECUTED."

The SSA Commissioner's *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982) nonacquiescence policy, ratified by Attorney General Ashcroft, is presented in *Hecht* because the "Jackson" regulation, 20 C.F.R. § 416.1130 (b), was not applied to the *Hecht* facts. This raises the Constitutional issue of whether the SSA Commissioner Barnhart and AG Ashcroft have breached their Article II, Section 3 duty to "take Care the laws be faithfully executed," by continuing to implement the SSA nonacquiescence policy contrary to the sworn July 25, 1985 Congressional testimony that the nonacquiescence policy was to have ended on June 3, 1985. This then raises the issue of whether the SSA nonacquiescence policy, based

on *United States v. Mendoza*, 464 U.S. 154 (1984), should have ended on June 3, 1985.

A. The Article II, Section 3 Constitutional duty and *Marbury v. Madison*

Based on their appointment by the President, SSA Commissioner Barnhart and Attorney General Ashcroft have an Executive Branch official's Constitutional duty to fulfill the Article II, Section 3 duty that they "shall take Care that the Laws be faithfully executed." This "take Care" clause is not being implemented when the Laws are not being executed equally to all aged, blind, and disabled citizens residing in all 50 States.

Pursuant to Article III of the constitution, the Supreme Court has the Constitutional authority to review Executive Branch decisions to determine if Executive Branch officials are breaching any of the Executive Branch's Constitutional duties. Attorney General Ashcroft's legal advice that SSA Commissioner Barnhart does not have to acquiesce to unappealed *Jackson* decision, now presents this Court with a Separation of Powers issue.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed 60 (1803), the Supreme Court fulfilled its Article III Constitutional duty to judicially review the decision of an Executive Branch not to enforce a law. The Supreme Court laid down a Constitutional marker that has endured for two centuries that an individual has a right to judicial review of an Executive Branch decision applying a statute:

> But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual

> who considers himself injured, *has a right to resort to the laws of his country for a remedy*. Emphasis Added.

The *Marbury* Court made clear that the Constitution provides that the Supreme Court has a right of judicial review over any case arising under the laws of the country:

> The constitution vests the whole judicial power of the United States *in one supreme court*, and such inferior courts as Congress shall, from time to time, ordain and establish. *This power is extended to all cases arising under the laws of the United States*; and consequently, in some form, may be exercised over the present case; because the right claims is given by a law of the United States. Emphasis Added.

Like any citizen, an Executive Branch official always has a right to appeal judicial decisions of district and circuit courts interpreting statutes if the Solicitor General of the United States believes that the district or circuit court incorrectly interpreted a law or an Executive Branch interpretation of the law. However, once the Supreme Court has rendered its decision, there can be no further Executive Branch appeal.

Thus, if the President's SSA Commissioner and the Attorney General fulfill their Article II, Section 3 duty to "take Care that the Laws be faithfully executed," then SSA Commissioner Barnhart and Attorney General Ashcroft should acquiesce to the unappealed *Jackson* decision. If SSA Commissioner Barnhart believes that *Jackson* was "incorrectly" decided, then the remedy is to amend the regulation and not breach the Executive Branch duty to "take Care" that the laws be faithfully executed.

B. The *Mendosa* nonacquiescence policy standard.

In *Mendosa*, the Court established the standards by which the Executive Branch can implement a nonacquiescence policy in an Immigration and Naturalization case. *Hecht* raises the issue of whether the *Mendosa* nonacquiescence holding applies to the Social Security Administration and to a *Ford v Shalala* nationwide class member.

The Department of Health and Human Services (HHS) and Social Security Administration nonacquiescence policy has a two decade long jurisprudence history. *See The Constitutional Case Against Intracircuit Nonacquiescence, Coenan, 75 Minn. L. Rev. 1399 (1991). Request for Public Comments: Agency Nonacquiescence in Decisions of the Court of Appeals*, 53 FR 71 (April 14, 1988). *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989). *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 Yale L.J. 801 (1989). *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. Pitt. L. Rev. 399 (1989).

The Second Circuit has had an over decade long experience reviewing the implementation of the Social Security Act "nonacquiescence" policy of HHS Secretaries Heckler, Bowen, Sullivan, and Shalala in the *Stieberger* litigation saga. *See Steiberger I v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985) *vac*, 801 F. 2d 29 (2d Cir. 1986), *Stieberger II v. Sullivan*, 738 F. Supp. 716 (N.D.N.Y. 1990), *Stieberger III v. Sullivan*, 792 F. Supp. 1376 (S.D.N.Y. 1992), 801 F. Supp. 1079 (S.D. N.Y. 1992),

Stieberger IV v. Apfel, 134 F. 3d 37 (2d Cir. 1997), *rev'g Stieberger v. Chater*, No. 95 cv 5622), *Stieberger V v. Apfel*, 1998 WL 556156 (S.D.N.Y. 1998). *See also The Politics of Nonacquiescence" The Legacy of Stieberger v. Sullivan*, 46 West SRRS 821 (1995).

The issue of the application of the *Mendosa* standard after the July 25, 1985 sworn Congressional testimony of Acting SSA Commissioner Mc Steen and DAAG Kuhl indicating that the HHS nonacquiescence policy had ended on June 3, 1985, was presented to this Court in *Gordon v. Shalala*, 55 F. 3d 101 (2d Cir., cert. den. 517 U.S. 1103, 116 S. Ct. 1317, 134 L. Ed. 470 (1996). In the government's February, 1996 *Gordon* Brief in opposition to the petition for a writ of certiorari, Solicitor General Days made the *Mendosa* nonacquiescence argument notwithstanding Solicitor General Days' knowledge of the sworn July 25, 1985 Congressional testimony that the nonacquiescence policy was to have ended on June 3, 1985.

Hecht provides an opportunity for the Court to review the process of how the Solicitor General applied the *Mendosa* standard to the SSI program. SSI recipients have limited access to legal resources to appeal the agency's nonacquiescence decisions which would allow for the percolation of decisions to this Court. *See* the SSI nonacquiescence regulation. 20 C.F.R. § 416.1485 *Application of Circuit Court Law*.

C. The June 14, 1991 Associate Commissioner Private Rental Subsidies Memo

The petitioner argues that the Second Circuit erred when it determined that the payment by the Trustee of the rent of the Daniel Hecht was not a rent subsidy. In the

Second Circuit Record was a June 14, 1991 memo that had been secured in a FOIA action that clearly indicated that HHS Secretary Sullivan had determined that private payments of rent for SSI recipients were rent subsidies. *See* Appendix Exhibit B.

The memo of the Deputy Commissioner for Programs identified the private rental subsidy issue that was caused by the "Jackson" income regulation, 20 C.F.R. § 416.1130(b), only being applied within the three Seventh Circuit States:

> In 1989, *Ruppert* challenged *rental subsidy policy* (and related issues) in the Second Circuit. That court remanded three of the eleven cases for determinations of *whether the rental subsidies charged reflected any actual economic benefit*. Although the court did not require application of the *Jackson* regulation, it did suggest that the regulation might provide a good indication of economic benefit. *Id.* at p. 2. Emphasis Added.

The Deputy Commissioner flagged in 1991 the same 2003 *Bush v. Gore* equal protection conundrum of SSA Commissioner Barnhart, that different standards were being applied in the Seventh and Second Circuit States in a program that the Congress intended was to apply equal standards in all 50 States:

> Under this option, the *Jackson* rule would continue to apply in the Seventh and Second Circuits. *In these circuits*, therefore, whether the required rent equals or exceeds the presumed maximum value, in-kind support and maintenance will not be found as a result of that arrangement. If the requires rent is less than the presumed maximum values, the amount of

> the rental subsidy would be the difference between the required rent and the presumed maximum value or current market value, whichever is less. *In all other circuits*, however, we would continue to consider the difference between the current market rental value and the amount of rent charged as a rental subsidy. The amount of in-kind support and maintenance charged the individual would be subject to the presumed maximum value." *Id.* at 7-8. Emphasis Added.

The Second Circuit chose to ignore the Associate Commissioner's June 14, 1991 Rental Subsidies Decision and the fact that the State Court Judge included this Court's *Ruppert* holding in the State Court ordered Trust:

> The distinction POMS SI 01120.200 draws between trust principal and disbursements *is persuasive both because it is consistent with the treatment of in-kind income in 20 C.F.R. 416.1103 (g) as well as with New York State trust law. See* N.Y. Est. Power & Trusts Law 7-1.12(b)(3) (Mc Kinney 2002) (actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any (government benefits) program"). Emphasis Added.

The petitioner argues that if the "power to persuade" standard is to be applied, then it is first to be applied by SSA Commissioner Barnhart *after* reading the *unredacted* June 14, 1991 Rental Subsidy memo with its *Jackson* options. The Court deferred to the Executive Branch Counsel's opinion that the payment by the Trustee of the rent was not a private rent subsidy. The Record does not

indicate that the SSA Commissioner had considered the options presented in the June 14, 1991 Rental Subsidies memo that directly addressed the *Jackson* nonacquiescence policy conundrum when there were private rent subsides in the States that were not within the Seventh Circuit.

The Second Circuit determined that the *Jackson* and *Ruppert* holdings and the application of 20 C.F.R. 416.1130 (b), did not apply based on its conclusion that this case did not involve a rent subsidy notwithstanding the panel's acknowledgement that Daniel did not pay for his own rent:

> In this case, however, as the district court correctly observed, *Hecht does not pay any rent. Rather, it is the Trustee who, pursuant to court order, pays Hecht's parents for his room and board.* When a third party pays a recipient's expenses, the applicable regulation is 20 C.F.R. 416.1103(g) (1994), which provides for "the value of anything the recipient receives as a result of such payment (to be) included in the recipient's income. "Ellis v. Apfel 147 F. 3d at 141. Thus, a third party's payment of some amount of room and board provides Hecht with in-kind income pursuant to 416.1103(g)." *Id.* Emphasis Added.

The petitioner argues that the June 14, 1991 memo is a "smoking gun" memo that the Second Circuit erred when it held that the payment of the rent by the Trustee of the SNT was not a private rent subsidy. The petitioner argues that if the Attorney General and the SSA Commissioner acquiesce to *Christensen*, then SSA Commissioner Barn-

hart should be reading the June 14, 1991 memo when considering the content of the "Ford" Noticies sent to *Ford* class members who receive private rent subsidies.

D. The tandem application of *Bush v. Gore* equal protection standard with the *Christensen* administrative law standard reveals the fatal flaw in applying the *Mendosa* nonacquiescence policy to SSI program in which Congress intended that there be an *equal* application of the duly promulgated regulations in all 50 States.

Since Congress intended that SSI regulations be *equally* applied in all 50 States, the appellant argues that the tandem application of the *Bush v. Gore*, 121 S. Ct. 525 (2000), equal protection standard with the *Christensen* administrative law standard, will eliminate any vestige of the implementation of the pre-June 3, 1985 nonacquiescence policy that has survived into 2003. The plaintiff argues that the "law" to be cited in the *Ford* Notices sent to millions of legally *defenseless* SSI recipients residing in all 50 states, both within and without the circuits, must be the *same* duly promulgated regulations.

In *Bush v. Gore*, the Supreme Court held that the government must apply the same legal standard when making the *same* adjudication:

> The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary. *Bush v. Gore*, 121 S. Ct. 525 (2000).

The petitioner makes the *Bush v. Gore* equal protection argument that if the same "chad" voting rule must be equally applied in Palm Beach County as applied in Dade County, then the *same Jackson* regulatory standard applied in the Seventh Circuit States, must be applied *equally* in all 50 States. As long as SSA Commissioner Barnhart does not apply the *same* duly promulgated regulatory standards equally in all 50 States, then this is an ongoing per se violation of the *Bush v. Gore* equal protection standard as applied to the SSI recipients in the 47 States whose benefits were reduced because the SSI recipients received private rental subsidies that paid their rent which was more than one-third of their monthly SSI income.

If the Court granted the petition, then Attorney General Ashcroft and Solicitor General Olson would have to address not only the *Bush v. Gore* equal protection standard issue, but also the *Christensen* administrative law holding as to Judicial deference to duly promulgated regulations, and not deference to Executive Branch counsel's interpretations of the regulations. The fact that the *Jackson* regulation is not applied in all 50 States reveals the fatal flaw in the argument that the *Mendosa* nonacquiescence standard should be applied to HHS and SSA cases.

In summary, the petitioner respectfully submits that the Court grant the petition in order that the Court can address the issue of whether the *Mendosa* nonacquiescence policy holding applies to the SSA. This is a timely issue because SSA Commissioner Barnhart and Attorney General Ashcroft have an Article II, Section 3 duty "to take care that the Laws be faithfully executed" when they

construct the "Ford" Notices sent to SSI recipients like petitioner Hecht who receives private rent subsidies.

CONCLUSION

Therefore, it is respectfully submitted that the petition be granted.

Respectfully submitted,

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516-766-7700

Counsel for Petitioner

September 25, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 02-6241
Filed: June 27, 2003

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 27th day of June, Two Thousand and Three.

PRESENT: HONORABLE Pierre N. Leval,
HONORABLE Reena Raggi
Circuit Judges,
HONORABLE Frederick J. Scullin, Jr.*

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* The Honorable Frederick J. Scullin, Jr., Chief Judge of the United States District Court for the Northern District of New York, sitting by designation.

DANIEL HECHT,
by his co-guardian, Donald Hecht,

Plaintiff-Appellant,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,

Defendant-Appellee.

APPEARING FOR APPELLANT: CHARLES ROBERT, Kassoff, Robert, Lerner & Robert, LLP, Rockville Centre, New York *for Plaintiff-Appellant.*

APPEARING FOR APPELLEE: VINCENT LIPARI, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, Varuni Nelson, Kathleen Mahoney, Assistant United States Attorneys, on the brief) *for Defendant-Appellee.*

SUMMARY ORDER

Appeal from the United States District Court for the Eastern District of New York (Arthur D. Spatt, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the United States District Court for the Eastern District of New York entered September 3, 2002, is hereby AFFIRMED.

Appellant Daniel Hecht, who in 1974 was rendered totally disabled by a pertussis inoculation, through his guardian challenges the district court's judgment affirming the decision of Appellee Commissioner of the Social Security Administration ("SSA") to reduce Hecht's Supplemental Security Income ("SSI") benefits in light of a monthly disbursement to his parents of $750 out of a Supplemental Needs Trust ("SNT") to cover expenses for their son's room and board.[1]

As we explained in *Ellis v. Apfel*, 147 F.3d 139, 141 (2d Cir. 1998), the SSA, operating within a "complex regulatory framework," provides SSI benefits to disabled individuals who meet statutory income and resource limitations. In Hecht's case, the SSA decided that funds in his irrevocable SNT account did not constitute a "resource" that rendered him ineligible for SSI benefits. *See* 20 C.F.R. § 416.1201(a) (1994) (noting that cash, liquid assets, or property qualifies as a "resource" for purposes of calculating benefits if the individual both owns the property and has the right to convert it to cash to be used for his support and maintenance); *see also* SSA Programs Operations Manual System ("POMS") SI 01120.200(D)(2) (noting that trust principal is not a resource if beneficiary lacks legal authority to revoke the trust or direct the use of its assets to his own support). Conversely, the SSA decided that disbursements from that same trust to reimburse Hecht's parents for his room and board did qualify as "income," thereby warranting a reduction in his benefits, *see* POMS SI 01120.200(E)(1) (noting that disbursements from a trust paid directly to the benefici-

[1] The fund's principal consists of a $500,000 award that Hecht received in 1988 to settle a malpractice suit relating to his disability.

ary or to a third-party in return for the beneficiary's receipt of food, clothing, or shelter qualify as income).[2]

In reviewing a district court decision upholding an SSI benefits determination, "we conduct a plenary review of the administrative record to determine if there is substantial evidence, considering the record as a whole, to support the Commissioner's decision and if the correct legal standards have been applied." *Shaw v. Chater*, 221 F.3d 126, 131 (2d Cir. 2000) (citing *Schaal v. Apfel*, 134 F.3d 496, 500-01 (2d Cir. 1998)). On this appeal, Hecht raises no evidentiary challenges; rather, he asserts that the district court failed to apply the correct legal standards to his case. Upon review of the district court's thoughtful memorandum and order, we disagree.

First, the district court did not err in declining to apply 20 C.F.R. § 416.1130(b) (1998) or *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982), to Hecht's case. 20 C.F.R. § 416.1130(b) is a regulation concerned with income in the form of a rent subsidy, i.e., the difference between what an SSI applicant actually pays for rooming expenses and fair market value. In *Jackson*, where the SSI recipient was paying 77% of his income for rent, the Seventh Circuit questioned the propriety of treating any rent subsidy as "income" absent evidence that it actually made "additional resources available to the recipient (increased purchasing power) to meet his or her basic needs." 683 F.2d at 1087. *See Ruppert v. Bowen*, 871 F.2d 1172, 1180 (2d Cir. 1989) (relying on *Jackson* in

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[2] An SSI recipient is awarded a flat monthly benefit, which can then be reduced if he receives non-excludable "income." *See* 42 U.S.C. § 1382(b). "Income" is defined "as anything that a recipient receives in cash or in-kind that can be used to meet the recipient's needs for food, clothing and shelter. 20 C.F.R. § 416.1102." *Ellis v. Apfel*, 147 F.3d at 141.

noting that rent subsidy might appropriately be disregarded as in-kind income where person paid disproportionate share of income for housing). In this case, however, as the district court correctly observed, Hecht does not himself pay any rent. Rather, it is the SNT trustee who, pursuant to court order, pays Hecht's parents for his room and board. When a third party pays a recipient's expenses, the applicable regulation is 20 C.F.R. § 416.1103(g) (1994), which provides for "the value of anything the recipient receives as a result of such payment [to be] included in the recipient's income." *Ellis v. Apfel*, 147 F.3d at 141. Thus, a third party's payment of some amount for room and board provides Hecht with in-kind income pursuant to § 416.1103(g). Because we conclude that both the district court and the SSA correctly rejected Hecht's argument that the SSA should rely exclusively on *Jackson*'s rent subsidy analysis in determining his receipt of in-kind income, we further conclude that the district court properly declined to review alleged geographic disparities in the SSA's treatment of rent subsidies or to remand the case for further evidentiary exploration of that issue.

Second, the district court did not err in relying on the POMS in upholding the SSA's benefits determination. Hecht is correct that such policy statements are not entitled to the same *Chevron* deference as implementing regulations. *See Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) (discussing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Nevertheless, policy statements are "entitled to respect" to the extent that they have the "power to persuade." *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also McMenemy v. City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001) (upholding statutory interpretation in agency manual that was consistent with language and purpose of the law, not-

ing that "even when deference is not required, an agency has a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance' " (quoting *Skidmore*, 323 U.S. at 140)). The distinction POMS SI 01120.200 draws between trust principal and disbursements is persuasive both because it is consistent with the treatment of in-kind income in 20 C.F.R. § 416.1103(g) as well as with New York State trust law. *See* N.Y. Est. Powers & Trusts Law § 7-1.12(b)(3) (McKinney 2002) ("actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any [government benefits] program").

Third, to the extent Hecht complains that the SSA's failure to provide him with adequate notice of the regulations relied on in its benefits determination denied him due process, the claim merits little discussion given that the Appeals Council set forth the basis for the SSA's final determination. Further, for the reasons stated by the district court and in this order, Hecht's legal challenges to the SSA's application of relevant regulations is without merit.

Finally, Hecht submits that the state court order authorizing trust disbursements was specifically crafted to avoid any reduction in his SSI benefits and that the district court's contrary ruling runs afoul of the *Rooker-Feldman* abstention doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Pursuant to *Rooker-Feldman*, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's rights." *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994). The doctrine is inapplicable. SSA did not lose in the state courts; it was not

even a party to the state court proceedings. And the state court, whatever may have been its intentions, had no authority over the effect of its ruling on SSI benefits.[3]

For the reasons stated, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN M. MACKECHNIE, CLERK

By: /s/ OLIVA M. SCORGE
Oliva M. Scorge

Date: June 27, 2003

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[3] *Navarro v. Sullivan*, 751 F. Supp. 349 (E.D.N.Y. 1990), upon which Hecht relies, is not to the contrary. At issue in *Navarro* was whether trust funds constituted a "resource" under 20 C.F.R. § 416.1201, thereby rendering plaintiff ineligible for SSI benefits. The district court did not abstain from considering that issue; rather, it ruled that use restrictions imposed on the trust funds by the state court deprived plaintiff of the power to liquidate the assets for his support and maintenance, which power was critical to the federal definition of "resource." *Id.* at 350. In this case, where the issue is whether trust disbursements constitute "income," the same court may not have intended for room and board payments to reduce Hecht's SSI benefits, but such third-party payments fall squarely within the definition of in-kind income pursuant to 20 C.F.R. § 416.1003(g) and POMS SI 01120.200(E)(1)(b).

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration
21009-43-7471

Refer to: S3E63 SI 1-3.1.12
Date: June 14, 1991
From: Deputy Commissioner for Programs
Subject: Rental Subsidies—DECISION
To: Commissioner of Social Security
Through: OEO _____

ISSUE

At issue is the appropriate treatment of rental subsidies in relation to income under the Supplemental Security Income (SSI) program.

PRESENT POLICY

A rental subsidy is the difference between the current market rental value of housing and the amount of rent a landlord charges under a nonbusiness arrangement. Such a subsidy is considered to be in-kind support and maintenance in the form of shelter and is subject to the presumed maximum value rule. That is, the total monthly value of all in-kind support and maintenance is presumed not to exceed one-third of the applicable Federal benefit rate plus $20. (At 1991 rates, the presumed maximum value for an individual is $155.66 and that for a couple is $223.33.) However, if a claimant shows that the actual value of in-kind support and maintenance is lower than the presumed maximum value, we use the actual value to determine eligibility and payment amount.

LAW, REGULATIONS, AND RULINGS

Section 1612(a)(2)(A) of the Social Security Act (the Act) provides that unearned income includes support and maintenance furnished in cash or kind. The Act does not define in-kind support and maintenance or mention rental subsidies.

Regulations (20 CFR 416.1130(b)) define in-kind support and maintenance as food, clothing, or shelter that is given to an individual or that an individual receives because someone else pays for it. Shelter consists of a number of items, including room and rent; however, there is no in-kind support and maintenance in the form of room or rent if a tenant pays the amount charged under a business arrangement.

The same regulatory section contains two rules concerning business arrangements: one for residents of Seventh Circuit States (Illinois, Indiana, and Wisconsin) and another for all others. However, Acquiescence Ruling (AR) 90-2(2), which became effective on July 16, 1990, extends the Seventh Circuit rule to Second Circuit States (Connecticut, New York, and Vermont).

> *General Rule*: A business arrangement exists when the monthly required rent equals the current market rental value of the property. In the absence of a business arrangement, the value of a rental subsidy is the difference between the current market rental value of the premises and the amount of rent required by the landlord.
>
> *Exception for Second and Seventh Circuits*: A business arrangement exists when the monthly required rent equals or exceeds the presumed maximum value.

If the required rent is less than the presumed value, the amount of the rental subsidy is the difference between the required rent and either the presumed value or the current market rental value, whichever is lower.

CURRENT OPERATING POLICY

Operating instructions assume that the amount of required rent equals the current market rental value unless a household member is the parent or child (including an "adult child") of the landlord or the landlord's spouse. This assumption resulted from early program data which indicated a higher incidence of rental subsidies when such a filial relationship existed. The assumption eliminates the need to determine the current market rental value for every individual who lives in a rented dwelling. Consequently, we determine a current market rental value only in a limited number of cases and the number of persons found to be receiving a rental subsidy is even smaller: 18,500 cases in December 1988 (or .5 percent of the SSI population) with an average rental subsidy of $59. Very few of these cases involve eligible children because most nonadult children live with their parents.

A determination of current market rental value usually is based on a landlord's estimate which we obtain by mail or telephone. However, if the landlord is unable or unwilling to provide an estimate, we contact a knowledgeable source (e.g., a real estate agent). Obtaining a current market rental value estimate is relatively simple except when dealing with some less mainstream housing arrangements that require an estimate from a knowledgeable source. For example, few sources are willing to estimate the value of

arrangements such as room rentals in areas not zoned for rental or old travel trailers parked on another's property without running water or sewer hookups. Providing such estimates is even less appealing given the Social Security Administration's (SSA's) practice of requesting them free of charge.

BACKGROUND

The policy of charging income to individuals who receive reduced rent has been challenged and upheld on a number of occasions and by several circuit courts. These courts have expressed the view that such individuals fare better and have more money available to meet other needs than do those who must locate and finance housing on the open market. These courts have remarked that Congress, in defining unearned income as "support and maintenance furnished in cash or kind," contemplated payment of a reduced benefit to those whose essential needs were being satisfied by other means.

However, in 1982 the Seventh Circuit Court of Appeals ruled (in *Jackson*) that the receipt of basic necessities at prices below market value constitutes unearned income only to the extent that it represents increased purchasing power. That court also ordered the amendment of SSI regulations to reflect this principle.

In 1989, *Ruppert* challenged rental subsidy policy (and related issues) in the Second Circuit. That court remanded three of the eleven cases for determinations of whether the rental subsidies charged reflected any actual economic benefit. Although the court did not require application of the *Jackson* regulation, it did suggest that that regulation might provide a good indication of economic benefit.

During the 1980s, the rental subsidy issue received a good deal of attention within SSA. An Acting Commissioner decided that such subsidies should not be treated as income. Then another Commissioner decided to maintain the status quo unless events dictated otherwise. The Policy Council discussed the issue but made no recommendation.

An issue that immediately presents itself in any discussion of rental subsidy is the disparate treatment of rents subsidized by private citizens and those subsidized through public housing. The former are considered income and reduce SSI benefits; the latter are excluded by statute and so have no effect on SSI benefits.

A second frequently posed issue is whether it would be appropriate to use the fair market values established by the Department of Housing and Urban Development (HUD) as a rebuttable presumption of current market rental values. That approach is not viable inasmuch as HUD uses two-bedroom, privately-owned housing as a standard; the result is rental values that are invariably much higher than the presumed maximum value.

OPTIONS AND DISCUSSION:

1. OPTION: Change national policy to eliminate consideration of rental subsidies as income.

   DISCUSSION: This option could be achieved through a regulatory change to provide that a rental subsidy is not income. The rationale would be that whatever rent is required represents the current market rental value. This approach would eliminate the only area of in-kind support and maintenance in which we question the

amount of a vendor's charge in determining whether someone is receiving income.

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PROS:

[REMAINING TEXT OF THIS PARAGRAPH ON PAGES 4 AND 5 OF THE DOCUMENT HAS BEEN REDACTED INTENTIONALLY]

* * * * * * *

CONS:

[REMAINING TEXT OF THIS PARAGRAPH ON PAGE 5 OF THE DOCUMENT HAS BEEN REDACTED INTENTIONALLY]

* * * * * * *

2. OPTION: Adopt the *Jackson* rule as national policy.

DISCUSSION: Under this option, we would consider that no in-kind support and maintenance arises from an arrangement whereby the required rent equals or exceeds the presumed maximum value. If the required rent is less than the presumed value, the amount of the rental subsidy would be the difference between the required rent and either the presumed value or the current market rental value, whichever is lower. This option would allow a uniform national rule. It would require a regulations change.

[REMAINING TEXT OF THIS PARAGRAPH
ON PAGES 5 AND 6 OF THE DOCUMENT HAS BEEN
REDACTED INTENTIONALLY]

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PROS:

[REMAINING TEXT OF THIS PARAGRAPH
ON PAGES 6 AND 7 OF THE DOCUMENT HAS BEEN
REDACTED INTENTIONALLY]

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CONS:

[REMAINING TEXT OF THIS PARAGRAPH
ON PAGE 7 OF THE DOCUMENT HAS BEEN
REDACTED INTENTIONALLY]

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3. OPTION: Maintain the status quo; i.e., maintain current national policy for all but the Seventh and Second Circuits.

   DISCUSSION: Under this option, the *Jackson* rule would continue to apply in the Seventh and Second Circuits. In these circuits, therefore, where the required rent equals or exceeds the presumed maximum value, in-kind support and maintenance will not be found as a result of that arrangement. If the required rent is less than the presumed maximum value, the amount of the rental subsidy would be the difference between the required rent and the presumed maximum value or current market rental value, whichever is less. In all other circuits, however, we would continue to consider the

difference between the current market rental value and the amount of rent charged as a rental subsidy. The amount of in-kind support and maintenance charged the individual would be subject to the presumed maximum value.

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PROS:

[REMAINING TEXT OF THIS PARAGRAPH ON PAGE 8 OF THE DOCUMENT HAS BEEN REDACTED INTENTIONALLY]

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CONS:

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RECOMMENDATION:

[REMAINING TEXT OF THIS PARAGRAPH ON PAGES 8 AND 9 OF THE DOCUMENT HAS BEEN REDACTED INTENTIONALLY]

* * * * * * *

Following your decision, I will talk with you about the best way to communicate that decision to the panel which has requested that it be publicized.

By: Louis D. Enoff

DECISION:

1. OPTION: Change national policy to eliminate consideration of rental subsidies as income.

   Approve _____ Disapprove _____ Date _____

COMPONENT CONSULTATIONS

Acting Deputy Commissioner for Finance, Assessment and Management

Concur _____ Nonconcur __X__ Date 5/15/91
See Tab A

Acting Deputy Commissioner for Operations

Concur __X__ Nonconcur _____ Date 4/30/91
See Tab B

Acting Deputy Commissioner for Policy and External Affairs

Concur _____ Nonconcur __X__ Date 5/7/91
See Tab C

2. OPTION: Adopt the *Jackson* rule as national policy.

   Approve _____ Disapprove _____ Date _____

COMPONENT CONSULTATIONS

Acting Deputy Commissioner for Finance, Assessment and Management

Concur _____ Nonconcur __X__ Date 5/15/91
See Tab A

Acting Deputy Commissioner for Operations

Concur _____ Nonconcur __X__ Date 4/30/91
See Tab B

Acting Deputy Commissioner for Policy and External Affairs

Concur _____ Nonconcur __X__ Date 4/30/91
See Tab C

3. OPTION: Maintain the status quo; i.e., maintain current national policy for all but the Seventh and Second Circuits.

Approve _____ Disapprove _____ Date _____

COMPONENT CONSULTATIONS

Acting Deputy Commissioner for Finance, Assessment and Management

Concur __X__ Nonconcur _____ Date 5/15/91
See Tab A

Acting Deputy Commissioner for Operations

Concur _____ Nonconcur __X__ Date 4/30/91
See Tab B

Acting Deputy Commissioner for Policy and External Affairs

Concur __X__ Nonconcur _____ Date 4/30/91
See Tab C

OGC has reviewed _____
Comments attached Yes __X__ No ___

Attachments:

Tab A — Acting Deputy Commissioner for Finance, Assessment and Management's Comments
Tab B — Acting Deputy Commissioner for Operations' Comments
Tab C — Acting Deputy Commissioner for Policy and External Affairs' Comments
Tab D — Office of the General Counsel's Comments
Tab E — SSI Modernization Project Expert's Comments

Supreme Court, U.S.
FILED

(2)

03No. 809 SEP 26 2003

OFFICE OF THE CLERK

IN THE

United States Supreme Court

DONALD HECHT, by his Co-Guardian,
DONALD HECHT, SS#: 054-60-6120 DI,

Petitioner,

against

JO ANNE B. BARNHART, Commissioner
of the Social Security Administration,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

SUPPLEMENTAL APPENDIX

Charles Robert
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516-766-7700

Counsel for Petitioner

TABLE OF APPENDICIES

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The Court is advised that in *Keys v. Barnhart*, 347 F.3d 990 (7th Cir. 2003), the Seventh Circuit held that the *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), administrative law holding applied to the Social Security Administration.

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF NEW YORK

CV 00-3996 (CPS)
[handwritten initial of:] (JM)

DANIEL HECHT,
by his Co-guardian, Donald Hecht,

Plaintiff,

— against —

KENNETH APFEL,
Commissioner of Social Security,

Defendant.

CV 00-5943 (CPS)

HEATHER CALEF,

Plaintiff,

— against —

KENNETH APFEL,
Commissioner of Social Security,

Defendant.

CV 00-6214 (CPS)
[Illegible handwritten initial]

WILLIAM ENDERBY,

Plaintiff,

— *against* —

KENNETH APFEL,
Commissioner of Social Security,

Defendant.

ORDER

The above captioned cases having been erroneously assigned to the undersigned as related to *Ford v. Apfel*, CV 94-2736 (CPS), the cases are returned to the Clerk for reassignment.

See Local Rule 50.3(f) for the Division of Business Among District Judges. The cases do not present a similarity of facts and legal issues with the *Ford* case. Nor do they arise from the same transaction or series of events. Nor will assignment to a single judge likely result in a "substantial saving of judicial resources." *See* Local Rule 50.3(a) for the Division of Business Among District Judges.

SO ORDERED.

Dated: Brooklyn, New York
January 23, 2001

/s/ [ILLEGIBLE SIGNATURE]
United States District Judge

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF NEW YORK

No. 00 CV 3996 (JM)
August 26, 2002

DANIEL HECHT,
by his Co-Guardian, Donald Hecht,

Plaintiff,

v.

JO ANNE BARNHART,
Commissioner of the Social Security Administration,[1]

Defendant.

Kassoff, Robert, Lerner & Robert, LLP, Rockville Centre, NY (Charles Robert, of counsel), *for Plaintiff*.

Alan Vinegrad, United States Attorney, Eastern District of New York, Central Islip, NY, By Vincent Lipari, A. U.S.A., *for Defendant*.

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[1] Jo Anne Barnhart, the current commissioner of the Social Security Administration, is substituted as the Defendant in place of Kenneth Apfel.

Memorandum of Decision and Order

SPATT, *District Judge.*

On May 12, 2000, the Social Security Administration ("SSA") determined that Daniel Hecht was eligible for Supplemental Security Income (SSI) payments. The SSA reduced his monthly benefits, however, because he received monthly disbursements from his Supplemental Needs Trust to pay his room and board. Plaintiff moves for a remand pursuant to the sixth sentence of 42 U.S.C. § 405(g) and the Commissioner of Social Security ("Commissioner") cross-moves for a judgment affirming the decision, arguing that the Commissioner properly determined the amount of SSI benefits to award plaintiff and that his final decision must, therefore, be affirmed under 42 U.S.C. §§ 405(g) and 1383(c)(3).

Background

Daniel Hecht ("Daniel") was born on December 14, 1974. When Daniel was three months old, he suffered from a severe reaction to a pertussis inoculation and became permanently disabled. He cannot walk, talk, or perform any activities of daily living. On May 2, 1988, Daniel received a settlement from a malpractice lawsuit in the amount of $500,000. In 1992, funds from the settlement were placed in a conservatorship account. In April 23, 1996, the Supreme Court, Nassau County, issued an order transferring the funds to a Supplemental Needs Trust Fund ("SNT") pursuant to Article 81 of New York's Mental Hygiene Law and appointed Daniel's parents as co-guardians. The court granted Daniel's parents the power to make reasonable expenditures for Daniel's supplemental

needs, including monthly expenditures in the amount of $750.00 for room and board.

On April 30, 1996, Plaintiff filed an application for SSI disability benefits. On June 14, 1996, Plaintiff filed a second application for SSI disability benefits. On June 27, 1996, the Social Security Administration ("SSA") denied Plaintiff's first application because it determined that Daniel had unearned monthly income in the amount of $750. On August 2, 1996, Plaintiff requested reconsideration. On May 14, 1998, the SSA granted Plaintiff's second application but reduced the monthly SSI payment based on his receipt of monthly income for food, clothing, or shelter. The SSA valued Daniel's income at $176.66 for June through December 1996, at $181.33 for January through December 1997, and at $184.66 for January through May 1998. On May 19, 1998, Plaintiff appealed this decision. On February 12, 1999, SSA issued a re-determination notice on Plaintiff's first application and determined that Daniel was eligible for reduced SSI payments for those months.

On February 22, 1999, Plaintiff requested a hearing before an administrative law judge. On September 15, 1999, Administrative Law Judge Emanuel Poverstein reversed the decision of the SSA and determined that because the Supplemental Needs Trust funds were excluded as a resource for SSI purposes, any use of the funds for room and board should be excluded as well. On November 3, 1999, Plaintiff was advised that the Appeals Council intended to review ALJ Poverstein's decision. On May 12, 2000, the Appeals Council vacated ALJ Poverstein's decision and issued a new decision finding that the disbursements from the SNT to pay from Daniel's room

and board constituted chargeable unearned income in the form of in-kind support and maintenance.

On July 11, 2000, Plaintiff filed this action. In this complaint, Plaintiff alleges that (1) Defendant has breached his Article II, Section 3 Constitutional duty to "take care that the laws be faithfully executed." by failing to follow the holdings in *Christensen v. Harris Cty.*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), *White v. Apfel*, 167 F.3d 369 (7th Cir. 1999), *Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989), and *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982); (2) Defendant violated the Due Process Clause of the Constitution by failing to set forth in his awards and denial notices the standards used to compute benefits and citations to applicable regulations; (3) Defendant violated the Due Process Clause of the Constitution by presuming the availability of assets that were in a trust that stated that the trustees were not to distribute the funds if it would result in a loss of government entitlements; (4) Defendant violated "the Equal Protection Clause of the Constitution by denying the mentally incapacitated plaintiff SSI benefits which are provided to competent SSI recipients because the SSA Commissioner presumes the availability of resources under the jurisdiction of the State Court for which there has *not* been an order to distribute the funds for 'support and maintenance' which results in the denial of SSI benefits because a different standard is applied to incompetent SSI recipients than applied to competent SSI recipients;" (5) Defendant "implemented an arbitrary and capricious policy and practice not to apply" 20 C.F.R. § 416.1201, regarding the liquidity of resources; (6) Defendant "implemented an arbitrary and capricious policy and practice not to apply" 20 C.F.R. § 416.1130(b), regarding the definition of in-kind support and mainte-

nance; and (7) Defendant violated Plaintiff's "federal and state statutory rights" in violation of 42 U.S.C. § 1983.

Plaintiff seeks an award of full benefits retroactive to the initial date of his SSI application, and injunctive relief, including orders that the Commissioner end his policy and practice of not "acquiesc[ing]" to the *White* holding and to "State Court orders that limit the use of funds under the jurisdiction of State Court Judges," that the Commissioner implement a policy and practice of issuing notices and agreements and issue an accurate POMS[2] section pursuant to 20 C.F.R. § 416.1242, and that the Commissioner amend the SSA regulations to establish a national standard in compliance with the *Jackson* holding.

On August 7, 2001, Plaintiff moved to remand the case for the reasons set out in the complaint. On October 11, 2001, Defendant cross-moved for judgment affirming the final decision of the SSA.

I Plaintiff's Motion to Remand

A. Remand for purposes of complying with Executive Orders

Plaintiff first argues that Defendant has failed to comply with Executive Orders 13217, 12606, 12612, and 12778. Plaintiff seeks a remand pursuant to the sixth sentence of 42 U.S.C. § 405(g) to provide the SSA with an opportunity to comply with these Executive Orders. In this regard, the law is clear that there is no private right of action to enforce obligations imposed on executive branch officials by executive orders. *Zhang v. Slattery*, 55 F.3d 732, 747

[2] POMS is an acronym for the SSA's Program Operation Manual System, the SSA's internal agency manual. *Frerks v. Shalala*, 848 F.Supp. 340, 347 (E.D.N.Y. 1994), *aff'd*, 52 F.3d 412 (2d Cir. 1995).

(2d Cir. 1995), *cert. denied*, 516 U.S. 1176, 116 S.Ct. 1271, 134 L.Ed.2d 217 (1996). Rather, an executive order is privately enforceable only if it is issued pursuant to a statutory mandate or delegation of congressional authority. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1336 (4th Cir. 1995). In fact, Executive Order 13217 states that it is

> intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Accordingly, Plaintiff's request for a remand on this basis must be denied.

B. Plaintiff's Due Process Claim

Relying on *Ford v. Shalala*, 87 F.Supp.2d 163 (E.D.N.Y. 1999), Plaintiff argues that Defendant violated the Due Process Clause of the Constitution because the May 14, 1998 notice did not inform him of the standards used in computing benefits with a citation to the applicable regulations. Plaintiff therefore seeks an order remanding the case "in order that the defendant has an opportunity to comply with Judge Sifton's unappealed *Ford* decision."

In *Ford*, Chief Judge Sifton held that notices sent to SSI applicants denied those applicants due process of law when they did not identify the provision of federal law, federal regulation, or POMS citation that the Commissioner applied to make determinations to grant or deny, change, or terminate benefits. *Id.* at 186. Here, the parties agree that the May 14, 1998 notice falls within the dates in the definition of the *Ford* class. Further, it is clear that the

May 14, 1998 notice does not meet the *Ford* requirements. Defendant argues, however, that a remand would be inappropriate because the relief to class members ordered in *Ford* is the modification of further notices, not remands of pending court cases. Defendant also contends that Plaintiff did not suffer any prejudice from the lack of legal citations since Plaintiff appealed the notice and the Commissioner's final decision did provide the applicable legal citations.

The final judgment in the *Ford* case specifies that the class members' remedy is the modification of future notices. *Ford v. Apfel*, 2000 WL 281888, at *1 (E.D.N.Y. January 13, 2000). Therefore, the decision in *Ford* does not compel this Court to remand this case so that the SSA can provide Plaintiff with a statement containing the citations upon which the SSA relied in reducing his benefits. Further, this Court agrees with Defendant that there is no reason to remand this case since the final decision provided the legal citations applicable to the SSA's calculation of his benefits. Accordingly, Plaintiff's request for a remand for the purpose of obtaining a new notice with citations is denied.

C. Defendant's failure to follow the holdings in *Christensen, White, Ruppert,* and *Jackson*

Plaintiff contends that the SSA has breached its Article II, Section 3 Constitutional duty to "take care that the laws be faithfully executed." by failing to follow the holdings in *Christensen v. Harris Cty.*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), *White v. Apfel*, 167 F.3d 369 (7th Cir. 1999), *Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989), and *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982). Plaintiff contends that Defendant's application of the SSA's internal manual, the POMS, in lieu of duly

promulgated regulations, violates the holding of *Christensen* and that Defendant's refusal to apply the holding of *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982), to Plaintiff and other SSI claimants not located in the states within the Court of Appeals for the Seventh Circuit violates the Equal Protection Clause as construed in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).

In *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982), a plaintiff class challenged the policy of the SSA to impute as unearned income to SSI recipients the difference between the rent actually paid for shelter and the fair market rental value of the shelter. The named plaintiff, Jackson, paid her sister $145 for rent with a fair market rental value of $250. *Id.* at 1077. The SSA concluded that Jackson received unearned income in the form of in-kind support and maintenance in the amount of $105 (the difference between the fair market rental value and the amount of rent she actually paid). *Id.* The Seventh Circuit reversed after examining the economic reality of Jackson's situation. The court calculated that Jackson paid 77% of her total income as rent. The Seventh Circuit therefore reasoned that the marginal utility of a bargain on rent to a person who already devoted 77% of her actual income to that bargain rent was "far less than the excess of the market value over actual rent." *Id.* at 1082. The court therefore vacated the SSA's decision and remanded the case to the district court to instruct the SSA to either change his interpretation of the regulations or amend the regulations so that a recipient's unearned income from receiving shelter at prices below market value would be attributable to her only when "the unearned income represents additional

resources available to the recipient (increased purchasing power) to meet his or her basic needs." *Id.* at 1087.

In response to the Seventh Circuit's opinion in *Jackson*, the SSA modified 20 C.F.R. 416.1130(b) to provide as follows:

> In-kind support and maintenance means any food, clothing, or shelter that is given to you or that you receive because someone else pays for it. . . . You are not receiving in-kind support and maintenance in the form of room or rent if you are paying the amount charged under a business arrangement. A business arrangement exist when the amount of monthly rent required to be paid equals the current market rental values (see § 416.1101). *Exception:* In the States in the Seventh Circuit (Illinois, Indiana, and Wisconsin), a business arrangement exists when the amount of monthly rent required to be paid equals or exceeds the presumed maximum value described in § 416.1140(a)(1). In those States, if the required amount of rent is less than the presumed maximum value, we will impute as in-kind support and maintenance, the difference between the required amount of rent and either the presumed maximum value or the current market value, whichever is less.

The crux of Plaintiff's arguments that the SSA breached its Article II, Section 3 Constitutional duty and violated his right to equal protection is based on the presumption that if the SSA applied this regulation as it is applied in the Seventh Circuit, his benefits would not have been reduced. Daniel, however, does not pay any amount of rent to his parents and there is no "business arrangement." Rather, the trustee pays $750 each month for Daniel's room and board.

Thus, since Daniel has his rent paid by a third party, Daniel's situation is governed by 20 C.F.R. § 416.1103(g) and the economic benefit test does not apply. *Ellis v. Apfel*, 147 F.3d 139 (2d Cir. 1998) (payments made to plaintiff's landlord by a third-party were in-kind support and maintenance and thus reduced plaintiff's SSI benefits); *Kulungian v. Apfel*, 208 F.3d 203, 2000 WL 287730 (2d Cir. 2000) (unpublished) (actual economic benefit test does not control the treatment of rental payments from a testamentary trust). Therefore, since the application of this regulation to Daniel would have no effect on his benefits, all of his arguments based upon the failure of the SSA to apply this regulation must fail.

D. Plaintiff's Equal Protection argument comparing competent and incompetent SSI recipients

Finally, Plaintiff alleges as a cause of action in his complaint that Defendant violated "the Equal Protection Clause of the Constitution by denying the mentally incapacitated plaintiff SSI benefits which are provided to competent SSI recipients because the SSA Commissioner presumes the availability of resources under the jurisdiction of the State Court for which there has *not* been an order to distribute the funds for 'support and maintenance' which results in the denial of SSI benefits because a different standard is applied to incompetent SSI recipients than applied to competent SSI recipients." First, Plaintiff does not argue this point in his briefs and thus it is waived since this Court can only guess at its meaning. Moreover, it is clear that there *is* a state order to distribute funds for "support and maintenance" since Daniel's SNT specifically orders the disbursement of $750.00 each month for Daniel's room and board.

II Commissioner's Cross-Motion for Judgment affirming the SSA's decision

The findings of the Commissioner as to any fact are conclusive if supported by "substantial evidence." 42 U.S.C. § 405(g) (2001). Thus, this Court may remand, modify, or reverse the SSA's final decision only if the SSA has misapplied the appropriate legal standard, or if the finding is not supported by substantial evidence. *Balsamo v. Chater*, 142 F.3d 75, 79 (2d Cir. 1998) (*citing Berry v. Schweiker*, 675 F.2d 464, 467 (2d Cir. 1982)). The Supreme Court has defined "substantial evidence" as "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)).

The sole issue to be decided by this motion concerns the computation of Daniel's SSI benefits. Defendant contends that it correctly determined that the disbursements from Daniel's Supplemental Needs Trust, which were used to pay his room and board, were chargeable income.

The SSI program provides monthly benefits to aged, blind, or disabled individuals whose income and resources do not exceed certain limits. 42 U.S.C. § 1382(a)(1). For the purpose of calculating benefits for eligible claimants, income is defined to include both earned and unearned income, and unearned income is defined to include "support and maintenance furnished in cash or in kind." *Id.* at 1382a(a); 1382a(a)(2)(A). The regulations define in-kind support and maintenance as "any food, clothing, or shelter that is given to you or that you receive because someone

else pays for it." 20 C.F.R. § 416.1130(b). Shelter includes room and rent. *Id.* Further, while bills paid by a third party on behalf of an SSI recipient are not, in and of themselves, considered income, the value of anything the recipient receives as a result of such payment is included in the recipient's income if what is received fits within the definition of in-kind income. 20 C.F.R. § 416.1103(g); *Ellis v. Apfel*, 147 F.3d 139, 141 (2d Cir. 1998).

There are two methods for determining a SSI recipient's income. If the SSI recipient lives in the household of another person who provides both food and shelter, in-kind income is valued at one-third of the recipient's federal benefit rate, regardless of its actual value. 20 C.F.R. § 416.1130(c). In all other cases, SSA presumes that the in-kind income is worth a maximum value ("PMV"). This PMV equals one-third of the federal benefit rate plus the amount of the general income exclusion set forth in 20 C.F.R. § 416.1124(c)(12), or $20. An SSI recipient may rebut the presumption involved in calculating a PMV by showing that the actual value of in-kind support and maintenance is less than the PMV. 20 C.F.R. §§ 416.1130(c), 416.1140.

Here, it is undisputed that pursuant to a state court order, Daniel's parents receive on a monthly basis $750.00 for room and board from Daniel's SNT. Pursuant to the SSA's Program Operation Manual System, "[f]ood, clothing or shelter received as a result of disbursements from the trust by the trustee to a third party are income in the form of in-kind support and maintenance and are valued under the presumed maximum value (PMV) rule." POMS SI 01120.200(E)(1)(b). Accordingly, the SSA determined that the disbursements from Daniel's SNT for room and board are a third party payment for in-kind support and mainte-

nance. The SSA thus reduced Daniel's SSI benefit under the one-third reduction rule.

Plaintiff contends that the disbursements should not have been deemed income since the disbursements were directed by the state court in accordance with the terms of the trust. Pursuant to Judge Rossetti's order, payments from the SNT were directed and authorized for room and board in the amount of $750.00. Further, Daniel's SNT specifically provided that all distributions are to "provide for the special needs of the beneficiary by furnishing those items of need not provided by government entitlements" and that "it is the intent of the Settlor to supplement rather than supplant, impair, or diminish government entitlements for which DANIEL HECHT may otherwise be eligible." Plaintiff concludes that since the disbursements were court-ordered and pursuant to the SNT, Daniel's benefits should not have been reduced.

In 1993, Congress created Supplemental Needs Trusts ("SNT"). 42 U.S.C. § 1396p(d)(4)(A). "A supplemental needs trust is a 'discretionary trust established for the benefit of a person with severe and chronic or persistent disability' and is intended to provide for expenses that assistance programs such as Medicaid do not cover." *Sullivan v. County of Suffolk*, 174 F.3d 282, 284 (2d Cir. 1999). Under New York State law governing the establishment of SNTs, neither the principal nor income held in the SNT may be deemed an available resource under any program of government benefits or assistance. However, "actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any such program." EPTL § 7-1.12(b)(3) (2000). Thus, Defendant may calculate disbursements from a SNT as unearned income without conflicting with the state law

establishing the SNT. The fact that the trust itself may provide that its disbursements should not affect Daniel's SSI benefits is irrelevant. Rather, it appears that the state court judge may have authorized distributions in violation of the provisions of the SNT. Further, this Court notes that Daniel's benefits would have been reduced by the one-third reduction rule even if Daniel received no disbursements from his SNT for room and board since he resides in his parents' household. 20 C.F.R. § 416.1131.

Plaintiff also argues that there are material issues of fact that require this Court to remand the case. Plaintiff contends that the issue of whether the disbursements should have been deemed income is a factual determination. There are no facts in dispute, however, and thus this is a question of law. Contrary to Plaintiff's assertion, the fact that the ALJ may have determined the issue differently than the appeals council does make this a factual dispute. It is a legal question and thus there is no basis for a remand.

Conclusion

Based on the reasoning above set forth, Defendant's motion for judgment affirming the administrative decision of the Commissioner of Social Security Administration is GRANTED. Plaintiff's motion for a remand is DENIED.

The Clerk of Court is directed to enter judgment dismissing this complaint and to close the case.

SO ORDERED.

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF NEW YORK

CV 00-3996 (JM)
Filed: September 4, 2002

DANIEL HECHT,
by his Co-Guardian DONALD HECHT,

Plaintiff,

v.

JO ANNE BARNHART,
COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION,

Defendant.

JUDGMENT

A Memorandum and Order of Hon. Jacob Mishler, United States District Judge, having been filed on August 26, 2002, granting defendant's motion for judgment affirming the administrative decision of the Commissioner of Social Security; denying plaintiff's motion for a remand; and directing the entry of judgment dismissing the complaint, it is

ORDERED AND ADJUDGED that plaintiff take nothing of the defendant; that defendant's motion for judgment affirming the administrative decision of the Commissioner of Social Security is granted; that plaintiff's motion for a

remand is denied; and that judgment is entered dismissing the complaint.

Dated: Central Islip, New York
September 4, 2002

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ [ILLEGIBLE SIGNATURE]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 02-6241
Filed: September 16, 2003

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of September 16th, two thousand three.

Present: Hon. PIERRE N. LEVAL
Hon. REENA RAGGI
Circuit Judges
Hon. FREDERICK J. SCULLIN*
District Judge

HECHT

v.

BARNHART

A petition for panel rehearing having been filed herein by Daniel Hecht

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* The Honorable Frederick J. Scullin of the United States District Court for the Northern District of New York, sitting by designation.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT:
ROSEANN M. MACKECHNIE, CLERK

By: /s/ ARTHUR M. HELLER
Arthur M. Heller,
Motions Staff Attorney